

Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DIANNE L. KELLEY and KENNETH
HANSEN,

Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington
Corporation,

Defendant.

NO. C07-0475 MJP

SUPPLEMENTAL DECLARATION
OF MARK WILNER IN SUPPORT
OF PLAINTIFFS' REPLY IN
SUPPORT OF MOTION TO
COMPEL DISCOVERY AND TO
DEEM CERTAIN REQUESTS FOR
ADMISSION "ADMITTED"

CLASS ACTION

I, Mark A. Wilner, declare as follows:

1. Identity and Competency. I am an attorney with the law firm of Gordon Tilden

Thomas & Cordell, LLP. Together with Keller Rohrback, LLP, we represent the plaintiffs.

2. Authentication of Documents. Attached as exhibits are true and correct copies of

the following documents:

<u>Exhibit Name</u>	<u>Tab</u>
Excerpts of the Rule 30(b)(6) Deposition Transcript of Christine Mullaney Sundlie	A
Excerpts of Microsoft's OEM Marketing Bulletin, dated September 20, 2006	B

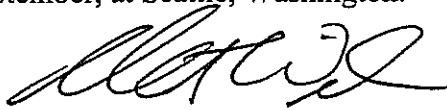
SUPPLEMENTAL DECLARATION OF MARK WILNER - 1
No. C07-0475 MJP

GORDON TILDEN THOMAS & CORDELL LLP
1001 Fourth Avenue, Suite 4000
Seattle, WA 98154
Phone (206) 467-6477
Fax (206) 467-6292

<u>Exhibit Name</u>	<u>Tab</u>
Excerpts of Cooperative Market Development Agreement	C
Letter, dated December 27, 2001, from Microsoft to Gateway	D
Excerpts of the Rule 30(b)(6) Deposition Transcript of Mark Tindeall	E
Excerpts of Form Microsoft Desktop Operating System License Agreement for OEM Customers	F
Email dated September 14, 2007 from Cassandra Kinkead (counsel for Microsoft) to myself	G

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of September, at Seattle, Washington.



Mark A. Wilner

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following. We have also served via the method indicated below.

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By 

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EXHIBIT A TO THE DECLARATION
OF MARK A. WILNER IS FILED
UNDER SEAL PURSUANT TO
DOCKET NO. 45

EXHIBIT B TO THE DECLARATION
OF MARK A. WILNER IS FILED
UNDER SEAL PURSUANT TO
DOCKET NO. 45

EXHIBIT C TO THE DECLARATION
OF MARK A. WILNER IS FILED
UNDER SEAL PURSUANT TO
DOCKET NO. 45

EXHIBIT D TO THE DECLARATION
OF MARK A. WILNER IS FILED
UNDER SEAL PURSUANT TO
DOCKET NO. 45

EXHIBIT E

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE
3

4 DIANNE L. KELLEY and KENNETH)
HANSEN,)
5)
Plaintiffs,)
6)
vs.) No. C070475 MJP
7)
MICROSOFT CORPORATION, a)
8 Washington corporation,)
9 Defendant.)

10
11 VIDEOTAPED 30(b)(6) DEPOSITION UPON ORAL EXAMINATION OF
12 MICROSOFT CORPORATION
13 MARK TINDALL
14 (CONTAINS CONFIDENTIAL TESTIMONY
15 SUBJECT TO PROTECTIVE ORDER)
16

17 8:52 A.M.

18 AUGUST 29, 2007

19 1001 FOURTH AVENUE, SUITE 4000

20 SEATTLE, WASHINGTON
21
22
23

24 REPORTED BY: JULIE R. HEAD, CRR, RPR, CCR No. 3119
25

<p style="text-align: right;">Page 2</p> <p style="text-align: center;">A P P E A R A N C E S</p> <p>FOR THE PLAINTIFFS:</p> <p>WILLIAM C. SMART IAN S. BIRK Keller Rohrbach LLP 1201 Third Avenue, Suite 3200 Seattle, Washington 98101-3052 (206)623-1900 wsmart@kellerrohrbach.com ibirk@kellerrohrbach.com</p> <p>FOR THE PLAINTIFFS:</p> <p>JEFFREY I. TILDEN MARK A. WILNER Gordon Tilden Thomas & Cordell LLP 1001 Fourth Avenue, Suite 4000 Seattle, Washington 98154-1007 (206)467-6477 jtilden@gordontilden.com mwilner@gordontilden.com</p>	<p style="text-align: right;">Page 4</p> <p>ALSO PRESENT:</p> <p>TANIA GRANT, Video Specialist, Yamaguchi, Obien, Mangio, LLC</p>																
<p style="text-align: right;">Page 3</p> <p>FOR THE DEFENDANT:</p> <p>CASSANDRA "CASSI" KINKEAD Davis Wright Tremaine LLP 1201 Third Avenue, Suite 2200 Seattle, Washington 98101-3045 (206)757-8078 cassikinkead@dwt.com</p> <p>FOR THE DEFENDANT:</p> <p>CHARLES B. CASPER Montgomery, McCracken, Walker & Rhoads, LLP 123 South Broad Street Philadelphia, Pennsylvania 19109 (215)772-7223 ccasper@mmwr.com</p> <p>FOR THE DEFENDANT:</p> <p>LINDA K. NORMAN Microsoft Corporation One Microsoft Way Redmond, Washington 98052-6399 (425)703-2780 lnorman@microsoft.com</p>	<p style="text-align: right;">Page 5</p> <p style="text-align: center;">I N D E X</p> <table> <tr> <td>EXAMINATION BY:</td> <td>PAGE</td> </tr> <tr> <td>MR. SMART</td> <td>7, 74</td> </tr> <tr> <td>MS. KINKEAD</td> <td>72</td> </tr> </table> <table> <tr> <td>EXHIBITS FOR IDENTIFICATION</td> <td>PAGE</td> </tr> <tr> <td>1 Notice of Videotaped 30(b)(6) Deposition</td> <td>16</td> </tr> <tr> <td>2 Microsoft's Initial Disclosures</td> <td>24</td> </tr> <tr> <td>3 Large Black Binder of Documents Beginning with 8/17/07 Letter to Ian S. Birk from Stephen M. Rummage, Re: Kelley v. Microsoft Corp. - Western District No. C07-00475 MJP, MS-KELL 5000001 - 5000059, MS-KELL 000000000001 - 000000000276</td> <td>27</td> </tr> <tr> <td>4 Windows Web Page Printout Entitled Choose and Edition. There's an Edition of Windows Vista That's Right for You</td> <td>65</td> </tr> </table>	EXAMINATION BY:	PAGE	MR. SMART	7, 74	MS. KINKEAD	72	EXHIBITS FOR IDENTIFICATION	PAGE	1 Notice of Videotaped 30(b)(6) Deposition	16	2 Microsoft's Initial Disclosures	24	3 Large Black Binder of Documents Beginning with 8/17/07 Letter to Ian S. Birk from Stephen M. Rummage, Re: Kelley v. Microsoft Corp. - Western District No. C07-00475 MJP, MS-KELL 5000001 - 5000059, MS-KELL 000000000001 - 000000000276	27	4 Windows Web Page Printout Entitled Choose and Edition. There's an Edition of Windows Vista That's Right for You	65
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2 (Pages 2 to 5)

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1 optimized and ready for set inappropriate expectations
2 and caused confusion among customers communicated to
3 retailers?
4 A. I don't know.
5 Q. Okay. Did you look for any documents that
6 communicated that fact to retailers?
7 A. No, I did not.
8 Q. Do you know of anybody who did?
9 A. No, I don't.
10 Q. Do you know why terms such as Ready for
11 Windows Vista would cause customer confusion where
12 Windows Vista Capable would not cause such confusion?
13 A. No, I don't.
14 Q. Do you know what the documents are that
15 reflect the research that determined that Ready for
16 Windows would cause confusion whereas Windows Vista
17 Capable would not cause confusion?
18 A. Once again, no, I have no knowledge of any
19 research.
20 Q. And you didn't look for such documents and
21 don't know where they might -- those documents might be,
22 if they do exist?
23 A. That's correct.
24 Q. Okay.
25 Could we take a little short break? I think

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1 we've been going for an hour or so.
2 MS. NORMAN: Sure.
3 THE VIDEOGRAPHER: We are now going off the
4 record in the continuing deposition of Mark Tindall.
5 The time is now 10:16 a.m.
6 (Recess taken.)
7 THE VIDEOGRAPHER: We are now back on the
8 record in the continuing deposition of Mark Tindall.
9 The time is now 10:26 a.m.
10 Q. (BY MR. SMART:) Mr. Tindall, are there
11 documents that require retailers to report their sales
12 of products that contain Microsoft software?
13 MS. KINKEAD: Objection: Lack of foundation.
14 A. So, your question, if I understand it, is
15 do -- do we have documents that show a requirement to
16 report what kind of products for Microsoft -- I'm not a
17 hundred-percent clear.
18 Q. (BY MR. SMART:) Well, let's take -- Let's
19 take the sales of computers that were designated Windows
20 Vista Capable. I was presuming that there were
21 documents reflecting financial information whereby the
22 retailers would report how many and for what price they
23 sold to Microsoft.
24 A. I'm not aware of any documents to that nature.
25 Q. Did you look for any?

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1 A. No.
2 Q. Okay. Who would know that information?
3 A. I don't know.
4 Q. Wasn't part of the Windows Vista Capable
5 program the establishment of a rebate or discount
6 program for various sellers of computers that contained
7 Microsoft product?
8 MS. KINKEAD: Objection: Lack of foundation.
9 A. That was not an area that I was responsible
10 for managing.
11 Q. (BY MR. SMART:) Sure. But you knew -- You
12 knew that there was such a program, right?
13 A. I was aware of the Express to Vista Upgrade
14 program.
15 Q. Okay. And wasn't there some sort of
16 requirement that the retailers would report back how
17 many they would sell?
18 A. I don't know.
19 MS. KINKEAD: Same objection.
20 Go ahead.
21 A. I don't know.
22 Q. (BY MR. SMART:) Did you look for any such
23 documents that reflected the number of sales or the
24 amount of the sales of any products under the Windows
25 Vista Capable program, whether it was the original sales

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1 of computers or the Express Upgrades?
2 A. No.
3 Q. Did anybody at Microsoft, prior to your
4 deposition here today?
5 A. Not that I'm aware of.
6 Q. Would it be fair to say, then, that with
7 regard to the existence of such information or what
8 information there is, you just don't have any idea?
9 A. Yes.
10 Q. Okay. Thank you.
11 This will be Exhibit No. 4.
12 (Plaintiffs' Exhibit 4 was marked for
13 identification.)
14 Q. (BY MR. SMART:) Showing you Exhibit No. 4 to
15 your deposition, sir. Are you familiar with this
16 document?
17 A. So, I'm assuming you got this from a Windows
18 Vista website; is that right?
19 Q. Or somebody.
20 A. Okay. This information looks familiar to me,
21 yes.
22 Q. Okay. It's simply a document off the website
23 that identifies what the features are for Windows Vista,
24 right?
25 A. Um-hum.

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1 Q. Is that a yes?
 2 A. Yes, yeah, that looks correct.
 3 Q. Okay. And there are 17 possible features; is
 4 that right?
 5 A. Well, I can count them.
 6 Yes, it looks like we put 17 on this
 7 particular chart.
 8 Q. Okay. And Basic gives customer three of those
 9 features, right?
 10 A. That looks to be accurate.
 11 Q. Okay. Was there any document, to your
 12 knowledge, that required retailers to tell customers
 13 that if a customer bought -- bought Windows Vista Basic,
 14 it was only going to get three of the potential 17
 15 different features?
 16 MS. KINKEAD: I'm sorry, could you read that
 17 back, please?
 18 (Record read as follows:
 19 Q. "Was there any document, to your
 20 knowledge, that required retailers to
 21 tell customers that if a customer bought
 22 Windows Vista Basic, it was only going
 23 to get three of the potential 17
 24 different features?"
 25 A. To my knowledge, we shared things similar to

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1 this grid with retailers.
 2 Q. (BY MR. SMART:) Appreciate that information,
 3 sir. It wasn't quite what I asked.
 4 My question was: Is there any document, that
 5 you know of, generated by Microsoft that required
 6 retailers to tell customers that if they bought --
 7 bought Windows Vista Basic, they would get only three of
 8 the 17 potential Vista features?
 9 A. With regard to requiring retailers to -- to
 10 tell a customer, I know of no document that requires
 11 that.
 12 Q. Do you know of any advertisements that
 13 advertise Windows Vista that told customers that if they
 14 bought Windows Vista Basic, they would only get three of
 15 the 17 features?
 16 MS. KINKEAD: Objection: Lack of foundation.
 17 A. I don't know of any advertising, no.
 18 Q. (BY MR. SMART:) Prior to your deposition here
 19 today, sir, did you look for any documents in the form
 20 of advertisements to determine whether or not any of
 21 those advertisements alerted customers to the fact that,
 22 if they bought Windows Vista Basic, they would only get
 23 three of 17 features?
 24 A. No.
 25 Q. Do you know of anybody who did?

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1 A. No, I do not.
 2 Q. What is the difference between Windows Vista
 3 Capable and Optimized for Windows Vista, to your
 4 understanding?
 5 A. I don't know.
 6 Q. Do you know of any documents that exist that
 7 explain the difference between those two concepts?
 8 A. No, I don't.
 9 Q. Did you ask anybody in the OEM group or the
 10 Windows business group or any of the ad agencies whether
 11 any such documents existed?
 12 A. No.
 13 Q. What is the difference between Ready for
 14 Windows Vista and Windows Vista Capable?
 15 A. I don't specifically know the difference
 16 between those two terms.
 17 Q. Did you look for any documents that explain
 18 the difference?
 19 A. No.
 20 Q. Did you ask anybody at the other groups --
 21 such as the Windows business group, the OEM group, or
 22 McCann-Erickson -- for any such documents?
 23 A. No.
 24 Q. Was there any effort on -- to your knowledge,
 25 to explain the differences of those concepts to

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**REDACTED PER
 MICROSOFT'S
 REQUEST**

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1 Q. Do you know of any documents, real -- strike
2 that.
3 Have you looked for any documents, prior to
4 your deposition here today, that relate to
5 advertisements created by any retailers for Windows
6 Vista capability?
7 A. No.
8 Q. Do you know of anybody at Microsoft who has?
9 A. No.
10 Q. And I think I earlier asked you this: You
11 haven't looked for any advertisements created by
12 Microsoft for Windows Vista capability, right?
13 A. No, I have not.
14 Q. I don't have any further questions.
15 MS. KINKEAD: Nothing further.
16 MR. SMART: Thank you, Mr. Tindall.
17 MS. KINKEAD: Thank you.
18 THE VIDEOGRAPHER: Here ends the deposition of
19 Mark Tindall. This is the end of tape one. The time is
20 now 10:56 a.m.
21 (Deposition concluded at 10:56 a.m.)
22 (Signature reserved.)
23
24
25

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1 CORRECTION & SIGNATURE PAGE
2 RE: DIANNE L. KELLEY, ET AL. v MICROSOFT CORPORATION
3 WESTERN DISTRICT AT SEATTLE; NO. C07-0475 MJP
4 MARK TINDALL; TAKEN AUGUST 29, 2007
5 Reported by: JULIE R. HEAD, CCR No. 3119
6 I, MARK TINDALL, have read the within
7 transcript taken AUGUST 29, 2007, and the same is true
8 and accurate except for any changes and/or corrections,
9 if any, as follows:
10 PAGE/LINE CORRECTION REASON
11 _____
12 _____
13 _____
14 _____
15 _____
16 _____
17 _____
18 _____
19 _____
20 _____
21 _____
22 Signed at _____, Washington,
23 on this date: _____
24
25 MARK TINDALL

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1 REPORTER'S CERTIFICATE
2
3 I, JULIE R. HEAD, the undersigned Certified Court
4 Reporter and Notary Public, do hereby certify:
5 That the sworn testimony and/or proceedings, a
6 transcript of which is attached, was given before me at
7 the time and place stated therein; that any and/or all
8 witness(es) were by me duly sworn to testify to the
9 truth; that the sworn testimony and/or proceedings were
10 by me stenographically recorded and transcribed under
11 my supervision, to the best of my ability; that the
12 foregoing transcript contains a full, true, and
13 accurate record of all the sworn testimony and/or
14 proceedings given and occurring at the time and place
15 stated in the transcript; that I am in no way related
16 to any party to the matter, nor to any counsel, nor do
17 I have any financial interest in the event of the case.
18 WITNESS MY HAND AND SEAL THIS 31st day of August,
19 2007.
20
21 JULIE R. HEAD, CRR, RPR
22 Certified Court Reporter
23 CCR No. 3119
24 Notary Public in and for the
25 State of Washington, residing in
Snohomish County. Commission
Expires 8-09-11.

EXHIBIT F TO THE DECLARATION
OF MARK A. WILNER IS FILED
UNDER SEAL PURSUANT TO
DOCKET NO. 45

EXHIBIT G

Mark Wilner

From: Kinkead, Cassandra [cassikinkead@DWT.com]
Sent: Friday, September 14, 2007 12:54 PM
To: Mark Wilner
Cc: Kinkead, Cassandra; Rummage, Steve; ccasper@mmwr.com
Subject: Kelley

Mark,

As we discussed, in exchange for your withdrawal of the portion of your motion to compel that seeks production of all OEM agreements, we are willing to stipulate to numerosity of the class as defined in your current complaint.

Please let me know if you have any questions or if I have misstated our understanding.

Thank you,
Cassi

Cassandra Kinkead | Davis Wright Tremaine LLP
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